STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals

JEANNE and KRISTIN OMELENCHUK, Co-Personal Representatives of the Estate of George Omelenchuk,	Supreme Court Case No. 117252 (After Remand)
Plaintiffs-Appellees, v	Former Supreme Court Case No. 114782
THE CITY OF WARREN, and the WARREN FIRE DEPARTMENT,	Court of Appeals Case No. 204098
Defendants-Appellants. /	Macomb Circuit Court Case No. 96-5448-NH

DEFENDANTS-APPELLANTS' BRIEF ON APPEAL

PROOF OF SERVICE

* * * **ORAL ARGUMENT REQUESTED** * * *

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DOES CONSIDERATION OF THE PLAIN LANGUAGE OF THE EMERGENCY MEDICAL SERVICES ACT (EMSA), MCL 333.20965, AND/OR THE PLAIN LANGUAGE OF THE GOVERNMENTAL TORT LIABILITY ACT (GTLA), MCL 691.1401, *et seq*, COMPEL THE CONCLUSION THAT THE CITY OF WARREN WAS ENTITLED TO SUMMARY DISPOSITION BASED ON ITS GOVERNMENTAL IMMUNITY, AS SET FORTH IN MCL 691.1407(1), FOR THE LIABILITY PLAINTIFF SEEKS TO IMPOSE ON IT PREMISED ON ITS ALLEGED VICARIOUS LIABILITY FOR THE GROSS NEGLIGENCE OF ITS EMPLOYEES WHILE PROVIDING EMERGENCY MEDICAL SERVICES?

Plaintiffs-Appellees say: "No".

Defendants-Appellants say: "Yes".

The Court of Appeals said: "No".

The Macomb County Circuit Court said: "Yes".

STATEMENT OF FACTS

Plaintiffs' decedent, George Omelenchuk, died on February 13, 1994, after collapsing at work. On July 19, 1996, suit was commenced in the Macomb County Circuit Court against the City of Warren and the Warren Fire Department, alleging liability under the Emergency Medical Services Act (EMSA) [MCL 333.20901, *et seq*].

According to the allegations of the Complaint, George Omelenchuk was discovered on the floor of his business on February 13, 1994, by Jeanne Omelenchuk. (Complaint, ¶¶ 10, 11; Apx, p 5a) Jeanne Omelenchuk called the Warren Police Department, which responded by sending an EMS Unit whose crew members were alleged to be the agents or employees of the Fire Department. (Complaint, ¶¶ 13, 27; Apx, pp 5a, 7a) According to the allegations of the Complaint, these individuals attempted to place an endotracheal tube into Mr. Omelenchuk's trachea, but succeeded only in placing it into his esophagus. (Complaint, ¶¶ 15-16, 19; Apx, pp 5a, 6a) After insertion of the endotracheal tube, Mr. Omelenchuk was transported to Detroit Osteopathic Hospital, where it was allegedly discovered that the tube had not been inserted into the trachea. (Complaint, ¶¶ 18-19; Apx, p 6a) Efforts to resuscitate Mr. Omelenchuk were unsuccessful. (Complaint, ¶¶ 19-20; Apx, p 6a)

Plaintiffs complained that the conduct of the EMS crew members in their treatment of George Omelenchuk constituted gross negligence which was the proximate cause of Mr. Omelenchuk's death and which substantially decreased his chance of survival. (Complaint, ¶¶ 31-36; Apx, pp 9a-12a) It was further alleged that the City of Warren was

vicariously liable for the gross negligence of its employees/agents. (Complaint, ¶¶ 29, 33; Apx, pp 7a, 11a)

On March 31, 1997, the City of Warren filed a motion for summary disposition, contending that it was entitled to a dismissal of the complaint on the bases of governmental immunity and the running of the statute of limitations. (Apx, pp 29a, *et seq*) Plaintiffs responded to this motion (Apx, pp 87a, *et seq*), and a hearing was held on May 12, 1997, at which time the circuit court granted defendant's motion on the basis of governmental immunity. (Tr 5/12/97, pp 10-11; Apx, pp 135a-136a) An order granting summary disposition was entered on May 23, 1997. (Order, 5/23/97; Apx, pp 138a-139a)

Plaintiffs filed a claim of appeal to the Michigan Court of Appeals on June 13, 1997, raising issues as to both the governmental immunity and statute of limitations defenses. Both issues were briefed by the parties. On April 6, 1999, the Court of Appeals affirmed, premised on the running of the statute of limitations. (Opinion, 4/6/99; Apx, pp 140a-142a) On or about April 29, 1999, plaintiffs filed a Motion for Rehearing with the Michigan Court of Appeals. Since the motion was untimely, it was not accepted by the Court but returned to plaintiffs' counsel by correspondence dated May 11, 1999. Plaintiffs filed a Delayed Application for Leave to Appeal to the Michigan Supreme Court on May 28, 1999, seeking review of the appellate ruling regarding the statute of limitations. Defendants thereafter filed a cross-application for leave to appeal, seeking

review and affirmance of the circuit court's ruling on the basis of governmental immunity.

On March 28, 2000, in lieu of either granting or denying leave to appeal, the Michigan Supreme Court issued a per curiam opinion, vacating the judgment of the Court of Appeals premised on the running of the statute of limitations, and remanding this case to the Court of Appeals for consideration of the immunity issue. *Omelenchuk v City of Warren*, 461 Mich 567; 609 NW2d 177 (2000). (Apx, pp 143a-155a) On remand, and without further briefing or argument, the Michigan Court of Appeals reversed the circuit court's grant of summary disposition to the City of Warren. (Opinion, 6/23/00; Apx, pp 156a-157a) In a memorandum opinion dated June 23, 2000, the Court held that vicarious liability could be imposed on the City of Warren for the gross negligence of its employees. It rejected the City's contention that the legislature's 1990 amendment to the EMSA, and specifically its addition of subsection 2, restored to the City the statutory governmental immunity defense of the Governmental Tort Liability Act. In a footnote, the Court of Appeals explained its ruling:

> Defendants argue that MCL 333.20965(2); MSA 14.15(20965)(2) of the Emergency Medical Services Act (EMSA) refers to the Governmental Tort Liability Act (GTLA), and therefore summary disposition was proper pursuant to MCL 691.1407; MSA 3.996(107). MCL 333.20965(2); MSA 14.15(20965)(2) provides that the provision governing gross negligence "does not limit immunity from liability otherwise provided by law for any of the persons listed in subsection (1)." However, review of the legislative intent underlying the Emergency Medical Services Act reveals that the legislation was reenacted with changes because it was scheduled to lapse on September 30, 1989. House Bill Analysis HB 4952, Second Analysis, January 11, 1990. There is no evidence or expressed intention in the legislative analysis to eliminate vicarious liability by incorporating the

provisions of the GTLA. *Id.* Defendants' contention is not supported by the legislative history.

(Opinion, 6/23/00, p 2, n1; Apx. p 157a)

Defendants sought leave to appeal from the Michigan Supreme Court on July 14, 2000. That application was granted by Order dated December 18, 2001, and directed the parties to address a specified issue:

> On order of the Court, the application for leave to appeal from the June 23, 2000 decision of the Court of Appeals is considered and it is GRANTED. The parties are directed to address the issue of statutory interpretation posed by the interaction between MCL 691.1407(1) and MCL 333.20965(1); Does MCL 333.20965(4) refer to the general immunity provided to governmental units in MCL 691.1407(1) so as to require a reading of MCL 333.20965(1) that effectively reinstates the immunity that §20965(1) purported to eliminated for acts or omissions of emergency medical personnel resulting from gross negligence or wilful misconduct?
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> (Order, 12/18/01; Apx. p 158a)

STATEMENT RE STANDARD OF REVIEW

The issue presented by this case concerns statutory interpretation, and is reviewed *de novo*. *Dye v St. John Hospital and Medical Center*, 230 Mich App 661, 665; 584 NW2d 747 (1998). Moreover, the Michigan Supreme Court succinctly stated the principal rule of statutory construction in *Massey v Mandell,* 462 Mich 375, 379-380; 614 NW2d 70 (2000) as follows:

> In examining a statute, it is our obligation to discern the legislative intent that may reasonably be inferred from the words expressed in the statute. *White v Ann Arbor*, 406 Mich 554, 562; 281 NW2d 283 (1979). One fundamental principle of statutory construction is that "a clear and unambiguous statute leaves no room for judicial construction or interpretation." *Coleman v Gurwin*, 443 Mich 59, 65; 503 NW2d 435 (1993). Thus, when the Legislature has unambiguously conveyed its intent in a statute, the statute speaks for itself and there is no need for judicial construction; the proper role of a court is to apply the terms of the statute to the circumstances in a particular case. *Turner v Auto Club Ins Ass'n*, 448 Mich 22, 27; 528 NW2d 681 (1995). Concomitantly, it is our task to give the words used by the Legislature their common, ordinary meaning. MCL 8.3a; MSA 2.212(1).

SUMMARY OF ARGUMENT

On November 21, 1989, the Michigan Court of Appeals released for publication its opinion in *Malcolm v City of East Detroit*, 180 Mich App 633; 447 NW2d 860 (1989), in which it held that the language employed in the then applicable Emergency Medical Services Act (EMSA), MCL 333.20737, provided a limited statutory exception to the immunity provided to governmental agencies by the Governmental Tort Liability Act (GTLA), MCL 691.1401, *et seq*. Thereafter, the EMSA was amended and reenacted in 1990 PA 179 as MCL 333.20965, including the addition of a new subsection, §20965(2), which specifically stated that "[s]ubsection (1) does not limit immunity from liability otherwise provided by law for any of the persons listed in subsection (1)."[1] On April 15, 1991, the Michigan Supreme Court released its opinion in *Malcolm v City of East Detroit*, 437 Mich 132; 468 NW2d 479 (1991), in which it agreed that the language of the then applicable EMSA provided a statutory exception to the immunity provided by the GTLA for governmental agencies, but limited that exception to a governmental agency's vicarious liability under the EMSA. In its opinion, the Michigan Supreme Court noted that the EMSA had been amended by the Legislature by 1990 PA 179, but further noted that the case before it did not involve the amended EMSA:

> In 1990 PA 179, the Legislature, apparently in response to the Court of Appeals opinion in this case, added subsection (2) to §20737 (which was

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[1] As discussed, *infra*, the EMSA was subsequently amended by 1997 PA 78, 1999 PA 199 and 2000 PA 375, wherein subsection (2) first became subsection (3), and then subsection (4). The pertinent immunity language of the EMSA is currently set forth at MCL 333.20965(4), although on February 13, 1994, when plaintiffs' cause of action arose, it was set forth as MCL 333.20965(2).

> also changed to MCL §333.20965) * * *. There was no indication that the amendment was to be given retroactive application; therefore, we do not express a view regarding any effect this amendment may have upon the analysis of this case.
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> (437 Mich, 141, n9)

In the case at bar, plaintiffs have asserted a cause of action against the City of Warren[2] under the EMSA. However, unlike the circumstances presented in *Malcolm, supra*, this case is governed by the provisions of the amended EMSA, MCL 333.20965(1) and (2), as it existed on February 13, 1994, the date plaintiffs' cause of action arose. It is the City's contention that the limited statutory exception recognized in *Malcolm, supra*, is no longer viable and that the City can successfully assert its governmental immunity under the GTLA as to plaintiffs' claims against it. Although the circuit court agreed, and granted summary disposition to the City, the Court of Appeals reversed. In its June 23, 2000 Opinion on Remand, the Michigan Court of Appeals held that a question of fact existed regarding plaintiffs' claim of vicarious liability against the City. (Apx, pp 156a-157a) The City's immunity defense was rejected in a footnote:

> Defendants argue that MCL 333.20965(2); MSA 14.15(20965)(2) of the Emergency Medical Services Act (EMSA) refers to the Governmental Tort Liability Act (GTLA), and therefore, summary disposition was proper pursuant to MCL 691.1407; MSA 3.996(107). MCL 333.20965(2); MSA 14.15(20965)(2) provides that the provision governing gross negligence "does not limit immunity from liability otherwise provided by law for any

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[2] Although plaintiff named both the City of Warren and the Warren Fire Department as defendants, the Warren Fire Department is not an entity capable of being sued individually. Rather, claims arising from the operation of the fire department are properly directed against the City of Warren. *Michonski v City of Detroit*, 162 Mich App 485, 490; 413 NW2d 438 (1987). Accordingly, the defendant in this case will be referred to as the City of Warren.

> of the persons listed in subsection (1)." However, review of the legislative intent underlying the Emergency Medical Services Act reveals that the legislation was reenacted with changes because it was scheduled to lapse on September 30, 1989. House Bill Analysis HB 4952, Second Analysis, January 11, 1990. There is no evidence or expressed intention in the legislative analysis to eliminate vicarious liability by incorporating the provisions of the GTLA. *Id.* Defendants' contention is not supported by the legislative history.
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> (*Omelenchuk v City of Warren (On Remand)*, 6/23/00, p 2, n1; Apx, p 175a)

Defendant City sought leave to appeal this ruling, contending that the Court of Appeals had erroneously interpreted §20965(2), and that it was entitled to the immunity provided to it under MCL 691.1407(1). On December 18, 2001, this Court granted defendant's application (Apx, p 158a), further ordering:

> * * * The parties are directed to address the issue of statutory interpretation posed by the interaction between MCL 691.1407(1) and MCL 333.20965(1): Does MCL 333.20965(4) refer to the general immunity provided to governmental units in MCL 691.1407(1) so as to require a reading of MCL 333.20965(1) that effectively reinstates the immunity that §20965(1) purported to eliminate for acts or omissions of emergency medical personnel resulting from gross negligence or wilful misconduct?

Since the cause of action in this case accrued on February 13, 1994, it is the interaction between the GTLA and the EMSA, as those statutes existed on that date, that is germane to the appropriate resolution of this case. It is defendant's principal contention that these statutes can harmoniously be read together by giving effect to the language of §20965(2) [now §29065(4)], which appropriately defers, *inter alia*, to the immunity provided to governmental agencies in MCL 691.1407(1). In further response to the inquiry implicit in this Court's order of December 18, 2001, it is also defendant's position that if MCL 333.20965(1) can be interpreted to modify the general immunity

granted to defendant by MCL 691.1407(1), the rules of statutory construction require that the defendant nevertheless be accorded all of the immunity from tort liability granted to it by the GTLA. Moreover, under prevailing case precedent, *Malcolm v City of East Detroit, supra*, is no longer good law. There are no statutory exceptions to the governmental immunity accorded by the GTLA except as stated within the GTLA itself. See, *e.g.*, *Alex v Wildfong*, 460 Mich 10; 594 NW2d 469 (1999). Although other statutes may expand on the "immunity" available to governmental defendants by limiting liability for activities which are not otherwise subject to governmental immunity under the GTLA, such statutes cannot reduce the defenses available under the GTLA. As presently constituted, policy choices concerning the scope of governmental immunity are made by the Legislature within the GTLA itself.

ARGUMENT

CONSIDERATION OF THE PLAIN LANGUAGE OF THE EMERGENCY MEDICAL SERVICES ACT (EMSA), MCL 333.20965, AND/OR THE PLAIN LANGUAGE OF THE GOVERNMENTAL TORT LIABILITY ACT (GTLA), MCL 691.1401, *et seq*, COMPELS THE CONCLUSION THAT THE CITY OF WARREN WAS ENTITLED TO SUMMARY DISPOSITION BASED ON ITS GOVERNMENTAL IMMUNITY, AS SET FORTH IN MCL 691.1407(1), FOR THE LIABILITY PLAINTIFF SEEKS TO IMPOSE ON IT PREMISED ON ITS ALLEGED VICARIOUS LIABILITY FOR THE GROSS NEGLIGENCE OF ITS EMPLOYEES WHILE PROVIDING EMERGENCY MEDICAL SERVICES.

Plaintiffs-Appellees, Jeanne and Kristin Omelenchuk, seek to impose vicarious liability on defendant-appellant, City of Warren, for the alleged gross negligence of its employees on February 13, 1994, while responding to a medical emergency. However, as a governmental entity engaged in the exercise or discharge of a governmental function,[3] the City of Warren was entitled to statutory governmental immunity pursuant to MCL 691.1407(1) as to such allegations, and the circuit court so held.[4] As explained by the Michigan Supreme Court in *Ross v Consumers Power (On Rehearing)*, 420 Mich 567, 624-625; 363 NW2d 461 (1984), this immunity applies both to claims of direct

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[3] On February 13, 1994, MCL 691.1401(f) defined "governmental function" as "an activity which is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law." The operation of emergency medical services is such an activity. See, *e.g.*, MCL 333.20948.

[4] On February 13, 1994, MCL 691.1407(1) provided: "(1) Except as otherwise provided in this act, all governmental agencies shall be immune from tort liability in all cases wherein the government agency is engaged in the exercise or discharge of a governmental function. Except as otherwise provided in this act, this act shall not be construed as modifying or restricting the immunity of the state from tort liability as it existed before July 1, 1965, which immunity is affirmed."

negligence against a governmental entity, as well as to the claims of vicarious liability which are present in this case:

> Even when a tort is committed during the course of the employee's employment and is within the scope of the employee's authority, the governmental agency is not automatically liable. Where the individual tortfeasor is acting on behalf of an employer, the focus should be on the activity which the individual was engaged in at the time the tort was committed. A governmental agency can be held vicariously liable only when its officer, employer or agent, acting during the course of employment and within the scope of authority, commits a tort while engaged in an activity which is non-governmental or proprietary, or which falls within a statutory exception. The agency is vicariously liable in these situations because it is in effect furthering its own interests or performing activities for which liability has been statutorily imposed. However, if the activity in which the tortfeasor was engaged in at the time the tort was committed constituted the exercise or discharge of a governmental function (i.e., the activity was expressly or impliedly mandated or authorized by constitution, statute or other law), the agency is immune pursuant to §7. See *Hirych v State Fair Comm.* 376 Mich 384, 391-393; 136 NW2d 910 (1965), and *Sherbutte v Marine City*, 374 Mich 48, 50; 130 NW2d 920 (1964). (The city cannot be held vicariously liable for torts of its police officers committed during the course of an arrest because the officers were engaged in police activity, which is a governmental function entitled to immunity.)

As discussed in such cases as *Ross, supra*, 420 Mich. 616, and *Hadfield v Oakland County Drain Comm'r*, 430 Mich 139, 146; 422 NW2d 205 (1988), in order to avoid this broad grant of immunity from tort liability, a claimant must identify either a statutory or common law exception. In *Ross, supra*, and *Hadfield, supra*, the potential statutory exceptions were noted to be those set forth in the GTLA itself, including MCL 691.1402 [the highway exception], MCL 691.1405 [the motor vehicle exception], MCL 691.1406 [the public building exception], and MCL 691.1413 [the proprietary function

"exception"].[5] Pursuant to *Hadfield, supra*, and *Li v Feldt (After First Remand)*, 434 Mich 584; 456 NW2d 55 (1990), and premised on the Court's interpretation of the final sentence of MCL 691.1407(1),[6] the potential common law exceptions were restricted to those which were recognized as exceptions to governmental immunity prior to passage of the governmental tort liability statute in 1965.[7]

But plaintiffs in the case at bar did not seek to rely on these recognized exceptions. Rather, relying on *Malcolm v City of East Detroit*, 437 Mich 132; 468 NW2d 479 (1991), they sought to rely on the provisions of the Emergency Medical Services Act (EMSA), MCL 333.20901, *et seq*, as providing a statutory exception to the City's immunity.

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[5] Moreover, MCL 691.1407 was amended in 1986 to include a public hospital exception to governmental immunity (1986 PA 175), and subsequent opinions have appropriately referenced MCL 691.1407(4) as one of the statutory exceptions. See, *e.g.*, *Brown v Genesee County Bd of Comm'rs*, 464 Mich 430, 434, n 2; 628 NW2d 471 (2001). In 1994, when plaintiffs' cause of action accrued, §1407(4) provided that "[t]his act does not grant immunity to a governmental agency with respect to the ownership or operation of a hospital or county medical care facility or to the agents or employees of such hospital or county medical care facility. * * *" This section was amended by 1999 PA 241, and again in 2000 PA 318.

[6] "Except as otherwise provided in this act, this act shall not be construed as modifying or restricting the immunity of the state from tort liability as it existed before July 1, 1965, which immunity is affirmed." MCL 691.1407(1).

[7] But see, Justice Griffin's concurring opinions in *Li v Feldt (After First Remand)*, 434 Mich 584, 596 *et seq*, 456 NW2d 55 (1990) and *Li v Feldt (After Second Remand)*, 439 Mich 457, 483; 487 NW2d 127 (1992), and the majority opinion in *Askwith v City of Sault Ste Marie*, 191 Mich App 1, 4; 477 NW2d 448 (1991), which question whether any common law exceptions are applicable to municipalities. This Court is currently considering that question in *Pohutski v City of Allen Park*, (#116949), *lv gr* 463 Mich 967; 621 NW2d 228 (2001), and *Jones v City of Farmington Hills*, (#117935), *lv gr* 463 Mich 968; 621 NW2d 226 (2001).

existing outside of the GTLA itself.[8] However, it is defendant's position that plaintiffs' reliance on the EMSA is misplaced since, as foreshadowed by this Court in its opinions in *Malcolm, supra*, and *Jennings v Southwood*, 446 Mich 125; 521 NW2d 230 (1994), the provisions of the EMSA applicable to plaintiff's cause of action cannot be read as modifying the governmental immunity from tort liability available to governmental entities under the GTLA. However, without any analysis of the statutory language set forth in the subsection added to the EMSA when the Legislature amended it in 1990, the Michigan Court of Appeals rejected this position, holding that the City could be held vicariously liable for the gross negligence of its employees. This holding, premised solely on the alleged absence of substantive discussion in the "legislative history" concerning the addition of subsection (2), is clearly erroneous and ignores the clear statutory language of both the GTLA and the EMSA.

(A) *Contrary to the holding of the Court of Appeals, the analysis employed by the Michigan Supreme Court in Malcolm v City of East Detroit is no longer viable following the Legislature's 1990 Amendment to the EMSA.*

Shortly after the Michigan Court of Appeals concluded in *Malcolm, supra*,[9] that the Legislature had intended the EMSA to provide a statutory exception to the immunity available under the GTLA, the EMSA was amended by the Legislature. The question

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[8] Plaintiffs did not name the individual EMS crew members as defendants and the question of their liability for gross negligence under either the GTLA or the EMSA is not presented. The only question presented is whether the City of Warren, a governmental entity, can, consistent with the GTLA, be held vicariously liable for the gross negligence of its employees.

[9] *Malcolm v City of East Detroit*, 180 Mich App 633; 447 NW2d 860 (1989).

presented to the Court of Appeals in the case at bar was whether the provisions of the amended EMSA, and specifically the addition of subsection (2), reflected a legislative determination that governmental agencies retain their immunity in cases such as the one at bar.[10] As more fully discussed below, defendant submits that it does.

The cause of action in *Malcolm* arose in 1984 and concerned the alleged negligence of employees of the City of East Detroit while rendering emergency medical assistance to plaintiff. The question presented on appeal was whether the provisions of the EMSA in effect at the relevant time [MCL 333.20737] constituted a statutory exception to governmental immunity. Disagreeing with the contrary statements contained in *Bokor v City of Detroit*, 178 Mich App 268; 443 NW2d 399 (1989), the Michigan Court of Appeals found that it did.[11] The Michigan Supreme Court resolved the conflict between *Bokor* and *Malcolm*, and held that the EMSA did modify the GTLA so as to allow suit against a governmental agency, but only as to its vicarious liability and not as to any allegations of direct liability.

Although the EMSA had been amended by the Legislature following the release of the Court of Appeals opinion, the Michigan Supreme Court construed only the pre-amendment provisions, which provided in MCL 333.20737:

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[10] This question was recognized but left unresolved by this Court in both *Malcolm, supra*, 446 Mich, 141, n1, and *Jennings v Southwood*, 446 Mich 125, 149-150; 521 NW2d 230 (1994).

[11] The *Malcolm* Court of Appeals opinion, 180 Mich App 633; 447 NW2d 860 (1989), was decided on October 17, 1989, and released for publication on November 21, 1989.

> When performing services consistent with the individual's training, acts or omissions of an ambulance attendant, emergency medical technician, emergency medical technician specialist, or advanced emergency medical technician do not impose liability on those individuals in the treatment of a patient when the service is performed outside a hospital. Such acts or omissions also do not impose liability on the authorizing physician or physician's designee, the person providing communications devices, the ambulance operation, the hospital or an officer, member of the staff, nurse, or other employee of the hospital, or the authoritative governmental unit or units. All persons named in this section, and emergency personnel from outside the state, are protected from liability unless the act or omission was the result of gross negligence or wilful misconduct.

Paying strict attention to the language chosen by the Legislature, the Supreme Court found therein a specific legislative intent for the EMSA to modify the GTLA and thereby create a statutory exception to governmental immunity. The Court's analysis began with the distinction drawn in the legislation between use of the words "persons" and "individuals":

> The definition of "person" in the EMSA explicitly stated that the term included governmental entities other than an agency of the United States. MCL 333.20706(2); MSA 14.15(20706)(2). Additionally, a differentiation between governmental entities and human persons was made by use of the term "individuals" in §20737 where such a differentiation was desired. Therefore, the City of East Detroit is a "person" as that term was used in §20737 of the EMSA.
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> (437 Mich, 138)

Since the last sentence of the pertinent section provided that "[a]ll persons named in this section . . . are protected from liability unless the act or omission was the result of gross negligence or wilful misconduct", the *Malcolm* Court concluded that governmental entities were "persons" who were protected from liability under the EMSA, "unless the act or omission was the result of gross negligence or wilful misconduct." Insofar as such

liability was allowed under the EMSA, an exception to governmental immunity existed. This exception to immunity was, however, limited to the governmental agency's potential vicarious liability:

> In essence, the third sentence in §20737 stated that any person named in the section was granted immunity unless the act or omission of the "individuals" enumerated in the first sentence constituted gross negligence or wilful misconduct. The gross negligence and wilful misconduct standard set forth in the third sentence would indicate that the "individuals" listed in the first sentence were directly liable for gross negligence and wilful misconduct and that the authoritative governmental units listed in the second sentence were vicariously liable for those same acts or omissions that constituted gross negligence or wilful misconduct by such "individuals."
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> (437 Mich, 145)

Thus, considering rules of statutory construction, and scrutinizing the language of the statute, the Michigan Supreme Court found an exception to governmental immunity which had not been specifically set forth by the Legislature in the GTLA.

Given this analysis in *Malcolm*, which led to the holding that the EMSA constituted a limited exception to the GTLA, a question presented in the case at bar is whether the *Malcolm* Court's holding survived the 1990 amendment to the EMSA. In both *Malcolm, supra,* and *Jennings, supra,* the Michigan Supreme Court recognized the 1990 amendment to be a likely reaction to the *Malcolm* Court of Appeals opinion, which had found an exception to the GTLA within the EMSA. However, since the amended EMSA did not apply to the cases presented in either *Malcolm* or *Jennings*, neither opinion discussed the significance of the amendment to the issue of governmental immunity from tort liability. As explained in *Jennings*, 446 Mich, 149-150:

> The alleged acts of gross negligence in this case, like the *Malcolm* case, occurred before a 1990 amendment. Thus this case is controlled by the construction of the earlier statute, as followed in *Malcolm*. This Court issued its opinion in *Malcolm* in April 1991, after the 1990 amendment. While it acknowledged the amendment, it concluded that the amendment was not to be given retroactive application:
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> > In 1990 PA 179 the Legislature, apparently in response to the Court of Appeals opinion in this case, added subsection (2) to §20737 (which was also changed to MCL 33.20965; MSA 14.15[20965]) which provides:
> >
> > > "(2) Subsection (1) does not limit immunity from liability otherwise provided by law for any of the persons listed in subsection (1)."
> >
> > There was no indication that the amendment was to be given retroactive application; therefore, we do not express a view regarding any effect this amendment may have upon the analysis of this case. [*Malcolm* at 141, n9.]

The case at bar does raise the question of the significance of the 1990 amendment to governmental immunity and it is submitted that the correct answer is as found by the circuit court. When the Legislature added subsection (2), it specifically stated that, notwithstanding subsection (1), [which had been construed so as to allow for the imposition of liability on "persons" because of the gross negligence or wilful misconduct of "individuals"], the EMSA was not intended to "limit immunity from liability otherwise provided by law for any of the persons listed in subsection (1)". This included the immunity provided to authoritative governmental units such as the defendant, City of Warren. In other words, even if the imposition of liability under the EMSA were otherwise permissible, the Legislature stated that the EMSA was not intended to avoid the layer of immunity provided by other statutes, including the GTLA.

This conclusion is supported by the plain language of the statute and the rules of statutory construction.[12] There is no question that the primary rule of statutory construction is to discern and to give effect to the intent of the Legislature. See, *e.g.*, *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999); *Brown v Genesee County Board of Commissioners*, 464 Mich 430, 437; 628 NW2d 471 (2001). "Statutes should be interpreted consistently with their plain and unambiguous meanings." *Stozicki v Allied Paper Co*, 464 Mich 257, 263; 627 NW2d 293 (2001). Moreover, "[t]he first step in discerning intent is to examine the language of the statute in question" and "[j]udicial construction is authorized only where it lends itself to more than one interpretation." *Shallal v Catholic Social Services*, 455 Mich 604, 611; 566 NW2d 571 (1997). If the language of the statute is unambiguous, no further judicial construction is permitted. *Sun Valley Foods, supra*; *Frankenmuth Mutual Ins Co v Marlette Homes, Inc*, 456 Mich 511, 515; 573 NW2d 611 (1998). As concisely stated by the Michigan Supreme Court in *Robinson v City of Detroit*, 462 Mich 439, 459; 613 NW2d 307 (2000):

> Because the Legislature is presumed to understand the meaning of the language it enacts into law, statutory analysis must begin with the wording of the statute itself. *Carr v General Motors Corp*, 425 Mich 313, 317; 389 NW2d 686 (1986). Each word of a statute is presumed to be used for a purpose, and, as far as possible, effect must be given to every clause and sentence. *Univ Of Mich Bd of Regents v Auditor General*, 167 Mich 444, 450; 132 NW 1037 (1911). The Court may not assume that the Legislature

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[12] It is also supported by the standard analysis which considers questions of governmental immunity as threshold inquiries. See, e.g., *Kerbersky v Northern Michigan University*, 458 Mich 525, 530, n5; 582 NW2d 828 (1998); *Canon v Thumudo*, 430 Mich 326, 335; 422 NW2d 688 (1988). The first inquiry is whether governmental immunity applies, and it is only if this question is answered in the negative that one must then inquire whether the elements of the available cause of action have been satisfied.

> inadvertently made use of one word or phrase instead of another. *Detroit v Redford Twp*, 253 Mich 453, 456; 235 NW 217 (1931). Where the language of the statute is clear and unambiguous, the Court must follow it. *City of Lansing v Lansing Twp*, 356 Mich 641, 649; 97 NW2d 804 (1959).

Furthermore, when judicial construction of more than one statute is at issue, and as noted in *Rathbun v State of Michigan*, 284 Mich 521, 544 (1938), the statutes should "be construed in harmony with each other, so as to give force and effect to each, as it will not be presumed that the legislature, in the enactment of a subsequent statute, intended to repeal an earlier one, unless it has done so in express term; nor will it be presumed that the legislature intended to leave on the statute books two contradictory enactments." The harmonious reading of the GTLA and the EMSA, and the interpretation which effectuates the intent of each statute, is the construction advanced herein by defendant.

(B) ***Consideration of the plain language of MCL 333.20965 compels the conclusion that it does not contain a statutory exception to the governmental immunity provided by MCL 691.1401, et seq.***

Consideration of the provisions of the EMSA demonstrates the legislative intent that governmental agencies enjoy all of the immunity provided to them by the GTLA, without restriction by provisions of the EMSA. Indeed, the EMSA was not intended to restrict the immunity of any person covered by its terms, whatever the nature of that immunity. In other words, the plain language of the legislation enacted as 1990 PA 179, applicable to the cause of action at issue in the case at bar, is sufficient evidence that the addition of subsection (2),[13] was intended to reinstate the immunity that had arguably been eliminated in subsection (1). Subsection (2) unequivocally states that "[s]ubsection

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[13] MCL 333.20965(2) [now MCL 333.20965(4)].

(1) does not limit immunity from liability otherwise provided by law for any of the persons listed in subsection (1)." Unless the term "immunity" can somehow be interpreted so as to exclude immunity under the GTLA, the effect of this provision in the case at bar seems plain. "Immunity" cannot be so interpreted.

In *Malcolm v City of East Detroit*, 437 Mich 132, 142; 469 NW2d 479 (1991), the Michigan Supreme Court enunciated the intent of the EMSA: "In enacting the EMSA, it seems the Legislature desired uniform regulation of emergency medical services and that it also intended to limit the liability exposure which may be created by providing such emergency medical services to the general public." Thus, as evident in the statutory language, one of the purposes of the EMSA was to limit the liability which might otherwise have been imposed on providers of emergency medical services. Some of the providers of these services, to whom the protections of the EMSA were directed, are governmental entities and the purpose of the EMSA would not be furthered by interpreting its provisions so as to grant *less* immunity to these providers than they were otherwise entitled to under the GTLA. This is the import of the legislature's addition of subsection (2) to the EMSA.

Indeed, the EMSA was not intended to diminish the defenses available to any providers of emergency services, including affirmative defenses such as comparative negligence, the statute of limitations and release. The governmental provider also has the additional affirmative defense of "immunity granted by law" -- governmental immunity under the GTLA. When that defense applies, it operates as a complete defense. When

that defense does not apply, as when a recognized exception to immunity exists (such as the proprietary function exception or the motor vehicle exception), the governmental provider is still entitled to the limited liability provisions of the EMSA, where the Legislature's purpose and intent were made plain.

This construction is also consistent with the distinction drawn between considerations of governmental *immunity* and considerations of governmental *liability* in cases such as *Kerbersky v Northern Michigan University*, 458 Mich 525, 530, n5; 582 NW2d 828 (1998); and *Canon v Thumudo*, 430 Mich 326, 335; 422 NW2d 688 (1988). One must first consider the GTLA to determine whether the governmental agency is entitled to immunity and, if not, only then consider the provisions of the EMSA to determine if there is liability. As explained in *Kerbersky, supra,* 458 Mich. 530, n5:

> If a plaintiff's cause of action properly fits within a statutory exception to governmental immunity, the plaintiff must then establish the elements of his underlying cause of action. MCL 691.1412; MSA 3.996(112) (claims under this act are subject to all the defenses available to claims sounding in tort brought against private persons). See also *Canon v Thumudo*, 430 Mich 326, 335; 422 NW2d 688 (1988), which cautions against confusing the separate inquiries into immunity and negligence. For example, while governmental employees working in governmental buildings that are open for use by members of the public could invoke the defective buildings exception, recovery would be barred unless the exclusive remedy provisions of the worker's compensation act could be avoided. *Simkins v General Motors Corp (After Remand)*, 453 Mich 703, 710-712; 556 NW2d 839 (1996).[14]

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[14] Notably, the *Kerbersky* opinion did not conclude that avoidance of the exclusive remedy provision avoided both the hypothetical governmental employer's liability and its immunity defenses. Rather, the immunity defenses were contained in the GTLA, contrary to the opinion of the Court of Appeals in *Madison v City of Detroit*, 208 Mich App 356; 527 NW2d 71 (1995), *rev'd other grounds*, 450 Mich 976; 547 NW2d 653 (1996).

Accordingly, and in partial response to this Court's inquiry in its December 18, 2001 order granting leave to appeal, MCL 333.20965(4) [as presently enacted] does "refer to the general immunity provided to governmental units in MCL 691.1407(1)." If nongovernmental persons covered by the EMSA are entitled to other "immunity from liability otherwise provided by law," the EMSA also refers to such immunity. In no event is any person, including a governmental entity, to have less immunity under the EMSA than they are otherwise provided by law. While the EMSA may expand the immunity otherwise available to a person, it cannot retract from that immunity.

The plaintiffs' contrary interpretation, at least as advanced in the Court of Appeals, would ignore subsection (2) [now subsection (4)] of the EMSA, and render it a nullity. If, by adding this subsection, the Legislature had not intended to restore the governmental immunity withdrawn in *Malcolm*, what was its intended purpose? Plaintiffs have suggested below that it was intended merely to reinforce the fact that governmental employees were shielded from liability for gross negligence, as that term was defined in the GTLA, regardless of how the term might be interpreted in the EMSA. However, this argument is self-defeating. If, as plaintiffs conceded, the Legislature intended to preserve the immunity of the GTLA for the employees of governmental agencies by its enactment of subsection (2), why was it not also intended to preserve that immunity for the governmental entities themselves. Certainly nothing within subsection (2) so limits its terms. Indeed, consistent with the *Malcolm* Court's discussion of the meaning of the term "person", as used in the EMSA, to include authoritative governmental units, subsection

(2) also uses the term "persons", and not the more restrictive term "individuals". Plaintiffs' argument thus proves defendant's point and supported the circuit court's grant of summary disposition.

Nor did the Court of Appeals proffer an interpretation of the amended EMSA which supported its conclusion that, notwithstanding the addition of subsection (2), the EMSA remained an exception to the governmental immunity otherwise available to the defendant, City of Warren. Indeed, the Court of Appeals did not even discuss the statutory language, but relied exclusively on the asserted lack of any substantive discussion in the "legislative history." After holding that summary disposition was improperly granted to the City because a question of fact existed as to the existence of gross negligence, the Court explained its rejection of defendant's legal position in the following footnote:

> *Defendants argue that MCL 333.20965(2); MSA 14.15(20965)(2) of the* Emergency Medical Services Act (EMSA) refers to the Governmental Tort Liability Act (GTLA), and therefore summary disposition was proper pursuant to MCL 691.1407; MSA 3.996(107). MCL 333.20965(2); MSA 14.15(20965)(2) provides that the provision governing gross negligence "does not limit immunity from liability otherwise provided by law for any of the persons listed in subsection (1)." However, review of the legislative intent underlying the Emergency Medical Services Act reveals that the legislation was reenacted with changes because it was scheduled to lapse on September 30, 1989. House Bill Analysis HB 4952, Second Analysis, January 11, 1990. There is no evidence or expressed intention in the legislative analysis to eliminate vicarious liability by incorporating the provisions of the GTLA. *Id.* Defendants' contention is not supported by the legislative history.

Thus, the Court of Appeals rejected the reasonable interpretation of the statutory language which had been advanced by defendant, on the sole basis that it was not

supported by the legislative history since that history, as evidenced in the House Bill Analysis, did not contain "evidence or expressed intention . . . to eliminate vicarious liability by incorporating the provisions of the GTLA." It is respectfully submitted that there is no rule which requires that the analysis prepared by the state house of representatives and/or state senate contain specific reference to the meaning of a particular phrase or amendment in order for that amendment to be given a reasonable interpretation which is supported by the language chosen by the legislature itself. Indeed, such a rule is directly contrary to the principal rules of statutory construction, as set forth by the Michigan Supreme Court in cases such as *Frankenmuth Mutual Ins Co v Marlette Homes*, 456 Mich 511, 516-517; 573 NW2d 611 (1998); *Sun Valley Foods Co v Ward*, 460 Mich 230, 236-237; 596 NW2d 119 (1999); *Donajkowski v Alpena Power Co*, 460 Mich 243, 256-262; 596 NW2d 574 (1999); and *Robinson v City of Detroit*, 462 Mich 439, 459-460, 465, n25; 613 NW2d 307 (2000).

For example, in *Frankenmuth v Marlette Homes, supra*, when construing a legislative amendment to the statute of repose set forth in MCL 600.5839(1); MSA 27A.5839(1), the Supreme Court noted the recitation of the rules of statutory construction set forth by the Court of Appeals, including the statement that where judicial interpretation of statutes is necessary, "the Legislature's intent must be gathered from the language used, and the language must be given its ordinary meaning." (*Frankenmuth, supra*, 456 Mich, 515) However, because the Court of Appeals opinion had nevertheless erroneously relied on perceived "legislative intent" in amending the statute, thereby

avoiding a literal construction of the amendatory language, it was reversed. (*Frankenmuth, supra,* 456 Mich, 517) In the case at bar, the Court of Appeals failed to address the statutory language, relying exclusively on its perception of legislative intent premised on reference to outside sources. This approach was rejected by the Michigan Supreme Court in *Sun Valley Foods v Ward, supra,* where the Court reversed the holding of the Court of Appeals which had ignored the plain language of the tolling provisions of MCL 600.5744(5); MSA 27A.5744(5), in favor of what the appellate court had perceived to be the legislative intent. The Supreme Court explained the rules of statutory construction:

> The rules of statutory construction are well established. The foremost rule, and our primary task in construing a statute, is to discern and give effect to the intent of the Legislature. *Murphy v Michigan Bell Telephone Co*, 447 Mich 93, 98; 523 NW2d 310 (1994). See also *Nation v W.D.E. Electric Co*, 454 Mich 489, 494; 563 NW2d 233 (1997). This task begins by examining the language of the statute itself. The words of a statute provide "the most reliable evidence of its intent. . . ." *United States v Turkette*, 452 US 576, 593; 101 S Ct 2524; 69 L Ed2d 246 (1981). If the language of the statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written. No further judicial construction is required or permitted. *Tryc v Michigan Veterans' Facility*, 451 Mich 129, 135; 545 NW2d 642 (1996). Only where the statutory language is ambiguous may a court properly go beyond the words of the statute to ascertain legislative intent. *Luttrell v Dep't of Corrections*, 421 Mich 93; 365 NW2d 74 (1984).
>
> (460 Mich, 236)

The analysis and holding of the Michigan Court of Appeals in the case at bar is in direct conflict with this expression. Ignoring the plain words of the statute, and without discussion or a finding of any ambiguity or lack of clarity, the Court of Appeals went to the "legislative history" to interpret the statute, effectively negating the Legislature's

1990 addition of subsection (2). Moreover, the Court of Appeals pointed to neither policy statements nor direct references to the amendatory language in that legislative history to support its construction of the amended EMSA. Rather, the Court pointed to the perceived silence of the legislative history on the issue of immunity.[15] As noted by the majority opinion in *Donajkowski v Alpena Power Co*, 460 Mich 243, 261; 596 NW2d 574 (1999), in reference to the now disfavored doctrine of "legislative acquiescence," "sound principles of statutory construction require that Michigan courts determine the Legislature's intent from its *words*, not from its silence." When the issue is the silence of the house analysis, the need to look to the actual language utilized by the legislature in the statute itself is even more apparent. See also, *Robinson v City of Detroit*, 462 Mich 439, 465, n25; 613 NW2d 307 (2000). Indeed, overruling its own precedent, the *Robinson* Court criticized an analysis which relied on silence in the legislative history rather than reliance on the language chosen by the legislature as "an endeavor * * * to use the statute's 'history' to contradict the statute's clear terms." (*Robinson*, 462 Mich, 460)

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[15] A review of the house analysis cited by the Court of Appeals actually calls the Court's conclusion into question. That analysis clearly recognizes that some changes from the original EMSA are included in its reenactment, including the expansion of its immunity provisions. That expansion included the specification of additional categories of persons who would benefit from the limited immunity provided by the EMSA, while also noting that "[t]he bill specifically would not limit immunity from liability otherwise provided by law for anyone covered by this section."

(C) *Consideration of the plain language of the Governmental Tort Liability Act compels the conclusion that the MCL 333.20965 does not contain a statutory exception to the governmental immunity provided by MCL 691.1401, et seq.*

The holding of the Court of Appeals in the case at bar is in conflict with the plain language of the EMSA, as amended in 1990, while the position of the defendant City of Warren is wholly consistent with that statutory language. This conclusion, standing alone, compels reversal of the Court of Appeals and reinstatement of the summary disposition granted to defendant by the circuit court. The language of the EMSA supports defendant's position, and can be harmoniously read with the GTLA. Moreover, consideration of the terms of the GTLA further support and compel this conclusion. Indeed, there is case precedent to suggest that there are no statutory exceptions to the tort immunity provided by the GTLA beyond those specifically set forth therein.[16] Policy choices concerning the scope of the tort immunity available to governmental entities and individuals is made in the context of the GTLA, and not in other, more general, statutes. The Legislature has specifically demonstrated that focus on the GTLA, as well as its interest in the immunity available for claims against governmental medical providers, when it amended the GTLA in 1986 to add an exception to tort immunity that had not previously existed in the act, and when it amended that subsection in 1999 and 2000. (MCL 691.1407(4) [the public hospital exception].) While other statutes, including the EMSA, may limit the nature of a governmental defendant's potential liability, it is the GTLA that sets forth the parameters of the governmental immunity applicable to the

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[16] See *Alex v Wildfong*, 460 Mich 10; 594 NW2d 469 (1999), discussed *infra*.

limited tort liability that may otherwise be available. Any expansion or contraction of that immunity is made within the GTLA itself.

On February 13, 1994, when plaintiff's cause of action accrued, MCL 691.1407(1) provided as follows:[17]

> (1) Except as otherwise provided in this act, all governmental agencies shall be immune from tort liability in all cases wherein the governmental agency is engaged in the exercise or discharge of a governmental function. Except as otherwise provided in this act, this act shall not be construed as modifying or restricting the immunity of the state from tort liability as it existed before July 1, 1965, which immunity is affirmed.

Of significance, §1407(1) sets forth the general immunity from tort liability available to governmental agencies, and specifically provides that this immunity is applicable "except as otherwise provided *in this act*." (Emphasis added) Indeed, as repeatedly noted in virtually every opinion construing the GTLA, the act does "otherwise provide" a limited number of statutory exceptions. And, unlike the second sentence of §1407(1), which has been interpreted to allow for the possibility of common law exceptions to the immunity provided in the GTLA,[18] there is no similar provision allowing for *statutory* exceptions outside of the GTLA itself, while the plain language of the first sentence of §1407(1) specifically precludes it.

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[17] MCL 691.1407(1) was amended by 1999 PA 241 and, as presently enacted, provides: "Except as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function. Except as otherwise provided in this act, this act does not modify or restrict the immunity of the state from tort liability as it existed before July 1,1965, which immunity is affirmed."

[18] *Hadfield v Oakland County Drain Comm'r*, 430 Mich 139; 422 NW2d 205 (1988).

Further support for this construction of the plain language of §1407(1) can be found by considering the language chosen by the legislature in §1407(2). §1407(2) is the subsection which sets forth the general immunity from tort liability provided to governmental individuals. The general statement of such immunity set forth in §1407(2) is prefaced by the phrase "[e]xcept as otherwise provided in this *section*." (Emphasis added) And, indeed, "this section" [§1407] does "otherwise provide," including the broader immunity provided to some governmental individuals in §1407(5), and the narrower immunity found in §1407(4).[19] Moreover, *all* of the modifications to the general statement of immunity for individuals are found within "this section" (§1407), and not elsewhere in the act (GTLA).[20] Rather, it is the exceptions to the immunity from tort liability provided to the governmental agencies which are found elsewhere in the act, consistent with the prefatory language of §1407(1): "Except as otherwise provided in this *act*. . . " (Emphasis added) It is respectfully suggested that the Legislature's choice of words, and the distinction between its use of the word "act" in §1407(1) and the word "section" in §1407(2), further confirms the legislative intent that all of the exceptions to the immunity provided in §1407(1) be found within the "act", as all of the exceptions to the immunity provided in §1407(2) were found within the section itself.

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[19] As presently enacted, §1407(5) provides: "A judge, a legislator, and the elective or highest appointive executive official of all levels of government are immune from tort liability for injuries to persons or damages to property if he or she is acting within the scope of his or her judicial, legislative, or executive authority."

[20] Note, for example, that when the Legislature added an immunity exception applicable to governmental individuals, as in §1407(4), it did so within the "section" and not elsewhere in the "act".

(D) *Consideration of the interaction between the EMSA and the GTLA compels the conclusion that the EMSA does not contain a statutory exception to the governmental immunity provided by MCL 691.1401, et seq.*

Attempts to avoid the government's immunity from tort liability by reference to statutes existing outside of the GTLA have been largely unsuccessful. In *Malcolm, supra,* and *Ballard v Ypsilanti Township*, 457 Mich 564; 577 NW2d 890 (1998), the Court's analysis recognized the possibility of statutory exceptions outside of the GTLA, but the Legislature neutralized the holding in *Malcolm* by amending the EMSA, and the *Ballard* opinion itself rejected the argument that the Recreational Use Act (RUA), MCL 300.201 constituted such an exception.[21] Moreover, in *Alex v Wildfong*, 460 Mich 10; 594 NW2d 409 (1999), the Supreme Court rejected the possibility of such statutory exceptions. In either event, whether the Court applies the analysis of *Ballard* or the analysis of *Wildfong*, the EMSA does not constitute an exception to the immunity available to the defendant under the GTLA.

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[21] In *Madison v City of Detroit*, 208 Mich App 356; 527 NW2d 71 (1995), the Court of Appeals considered the interplay between the GTLA and the exclusive remedy provision of the Workers' Disability Compensation Act, MCL 418.131(1), and the intentional tort exception set forth therein. The Court of Appeals concluded that the intentional tort exception of the WDCA constituted an exception to immunity, premised on the Court's conclusion that the Legislature could not have intended to except the government from the pertinent provisions of the WDCA. This opinion was, however, reversed by the Supreme Court on the basis that the exception did not apply in any event. *Madison v City of Detroit*, 450 Mich 976; 547 NW2d 653 (1996). Notably, in its Order a majority of this Court stated that it was not deciding whether the intentional tort exception to the exclusive remedy provision constituted an exception to governmental immunity, while two justices opined that it did not constitute such an exception. In any event, the analysis of the Court of Appeals' opinion appears to have been implicitly rejected in *Kerbersky v Northern Michigan University*, 458 Mich 525, 530, n2; 582 NW2d 828 (1998).

In *Ballard v Ypsilanti Township, supra*, the Court considered the interaction between the GTLA and the Recreational Use Act (RUA), MCL 300.201, and rejected the plaintiff's contention that the RUA created an exception to the governmental immunity provided by the GTLA. Although the Court ultimately concluded that the RUA could not have created an exception to governmental immunity under the GTLA because it did not apply to public lands, the majority opinion nevertheless considered whether it could potentially have created such an exception. The Court noted that when the Legislature codified common law sovereign immunity in 1964 by enacting the GTLA, it placed all then existing exceptions to that immunity inside the act, and further noted that "[b]y the '[e]xcept as otherwise provided in this act' language, the GTLA proclaims to contain *all* exceptions to governmental immunity." *Ballard,* 457 Mich, 568-569. However, notwithstanding this language, the *Ballard* Court recognized that it was possible for the Legislature to create other exceptions to that immunity outside the GTLA, citing *Malcolm, supra* and *Harsha v Detroit*, 261 Mich 586; 246 NW2d 849 (1933), for the proposition that one Legislature cannot bind future Legislatures, which remain "free to amend or abolish governmental immunity by creating exceptions to it, either within the GTLA, or in the context of another statute." *Ballard*, 457 Mich, 569. Nevertheless, the Court held that the RUA was not such an outside exception because its language contained neither an express waiver of immunity nor a necessary inference of such a waiver.

Application of the *Ballard* analysis to the case at bar would also lead to the conclusion that the EMSA does not encompass an exception to the immunity provided in

the GTLA. As discussed above, to the extent that the EMSA could ever be read as including an express waiver of tort immunity, it can no longer be so read. Nor may a necessary inference of such a waiver be read into the EMSA based on either its purpose of uniform regulation of emergency medical services, or the circumstances surrounding its adoption. Finally, as in *Ballard* when the Court considered the RUA, the EMSA is a "liability-limiting," as opposed to a "liability-imposing," act, as it eliminates liability for negligence, leaving liability only for gross negligence or wilful misconduct.

Moreover, the analysis employed in *Ballard* does not give sufficient deference to the very specific language of the GTLA. While noting that, by its terms, the GTLA purports to contain all of the possible exceptions to the immunity it provides, the *Ballard* opinion ignored this language, noting only that one Legislature cannot bind subsequent Legislatures. However, the issue is not *whether* one Legislature can bind a future Legislature, but *how* that future Legislature can indicate its disagreement with, and intent to modify, the earlier statutory provision. Certainly it can directly amend or repeal the offending provision, but an intent to amend or repeal may not be read into the enactment of new legislation regulating a different subject that, at best, appears merely capable of an interpretation which conflicts with the plain language of other, earlier, legislation. See, e.g., *Rathbun v State of Michigan*, 284 Mich 521; 280 NW 35 (1938).

Significantly, the analysis employed by this Court in *Alex v Wildfong*, 460 Mich 10; 594 NW2d 469 (1999), gave appropriate deference to the plain language of the GTLA and is compelling precedent in the case at bar. In both *Alex, supra,* and *Haberl v Rose*, 225 Mich App 254; 570 NW2d 664 (1997), the question presented was whether liability

could be imposed on a governmental defendant under the Owner's Civil Liability Act (MCL 257.401), notwithstanding the immunity conferred on such defendants by the GTLA: Did the owner's liability statute constitute an exception to that immunity? As discussed below, the Supreme Court concluded that it did not.

In *Haberl, supra*, the defendant was driving her own car, on government business, when she was involved in a motor vehicle accident. Premised on the immunity available to her under MCL 691.1401(2), no liability could be imposed on the defendant because she had been acting within the scope of her authority, preforming a governmental function, and her conduct did not amount to gross negligence. Nor could liability have been imposed on her governmental employer because the motor vehicle exception to immunity, MCL 691.1405, applies only when the governmental agency is the owner of the vehicle. In *Haberl*, Since the defendant driver was also the owner of the vehicle, plaintiff sought to impose liability on her under the owner's civil liability act, MCL 257.401(1). Considering the interaction between the GTLA and the owner's liability act, the *Haberl* majority focused on the purpose (rather than the language) of the two acts, and concluded that the civil liability act controlled because, to hold otherwise would have produced an unacceptable result.[22] *Haberl*, 225 Mich App, 264-265. As discussed below,

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[22] "By enacting the civil liability act as well as carving out a specific automobile exception from the broad governmental immunity act, the Legislature expressed an intent that those who are injured by the negligent operation of a motor vehicle are entitled to compensation regardless of the ownership of the vehicle. To allow defendant to escape liability here would frustrate the purpose of the two statutes. To avoid this unacceptable result, we hold that the civil liability statute specifically applies to this case and controls the outcome." *Haberl*, 225 Mich App 264-265.

Judge Saad dissented and would have concluded that the owner's liability act did not create an exception to the defendant's governmental immunity, noting that the Legislature had made a policy choice in the GTLA when it provided immunity to governmental employees driving their own vehicles in the course of their employment, and while the courts might disagree with that choice, they were not free to disregard it. *Haberl,* 225 Mich App, 273.

The same question was presented to the Court of Appeals in *Alex v Wildfong*, CA #194121 (4/3/98),[23] where the individual defendant was a volunteer firefighter who was driving his own vehicle on his way to a fire when he was involved in a motor vehicle accident. Application of the GTLA provided immunity to both the firefighter and his governmental employer. However, applying *Haberl*, the majority of the Court of Appeals panel held that liability could be imposed on the individual defendant under the owner's liability act. As discussed below, Judge MacKenzie dissented, noting, *inter alia*, that the immunity provided to lower level governmental employees in MCL 691.1407(2) was limited only by the phrase "[e]xcept as otherwise provided in this section," while the owner's liability act was outside of the immunity section and, accordingly, could not restrict the immunity provided therein. On the individual defendant's application for leave to appeal, the Supreme Court reversed and overruled *Haberl, supra.* It explained, 460 Mich, 21-22:

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[23] This unpublished opinion of the Michigan Court of Appeals is attached hereto as Exhibit A.

> We agree with the dissenting opinion of Judge SAAD in *Haberl* [footnote omitted] and with the above-noted portions of the dissenting opinion written by Judge MACKENZIE in the present case.
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> The immunity statute is certainly the more specific measure in this instance. It deals directly with the potential liability of government employees and volunteers who are (or reasonably believe themselves to be) acting within the scope of their authority, on behalf of a governmental agency that is engaged in a governmental function. By contrast the owner's civil liability statute is a broad measure widely applicable to owners of vehicles.
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> As Judge SAAD explained, the Legislature has formulated a clear statutory framework for determining the extent of governmental immunity in a case arising from a motor vehicle accident. These provisions outline the immunity of government agencies [footnote omitted] and of individuals, [footnote omitted] as well as the extent of liability for harm caused by negligent operation of government-owned vehicles [footnote omitted] or failure to maintain the roadway. [footnote omitted] It is not for the courts to add or subtract from the balance struck by citizens of this state, as expressed by their elected representatives in the Legislature. [footnote 21]
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> FN 21. The dissent would apply the civil liability statute, MCL 257.401(1); MSA 9.2101(1), because it believes our conclusion frustrates the Legislature's intent to hold automobile owners, whether private citizens or governmental employees, liable for the ordinary negligence of drivers. The dissent, however, ignores the plain language of the more specific statute under these facts, i.e., the governmental immunity statute. * * *

Thus, based on the plain language of MCL 691.1407(2), as well as the rules of statutory construction which give deference to the more specific statute over the more general one, the Supreme Court held that the owner's liability statute did not create a statutory exception to the immunity provided to lower level governmental employees in the GTLA. In its words and through its holding, the Court recognized, as Judge Saad had noted in his dissent in *Haberl*, that the Legislature made its policy choices concerning the scope of governmental immunity from tort liability within the GTLA itself.

This analysis is directly applicable to consideration of the interaction between the GTLA and the EMSA. The immunity provided to governmental agencies in §1407(1) of the GTLA was limited only by the phrase "[e]xcept as otherwise provided in this act" and, insofar as the immunity of governmental agencies is concerned, the GTLA is the more specific of the statutes, wherein the Legislature evidences its policy choices concerning the scope of governmental immunity, while the EMSA broadly regulates all providers of emergency medical services. Indeed, in 1994, when plaintiffs' cause of action accrued, the Legislature's policy choices were apparent in the plain language of *both* the GTLA and the EMSA, and defendant City of Warren was entitled to the defense of governmental immunity against plaintiffs' claims.

Thus, further answering the inquiry set forth in this Court's December 18, 2001, order granting leave to appeal, consideration of the interaction between the statutes at issue in this case "require[s] a reading of MCL 333.20965(1) that effectively reinstates the immunity that §20965(1) purported to eliminate for acts or omissions of emergency medical personnel resulting from gross negligence or wilful misconduct."

It is respectfully suggested that this Court issue an opinion which harmoniously gives effect to the plain language of both the GTLA and the EMSA, whereby the immunity from tort liability provided to governmental agencies, as stated in the GTLA, is preserved.

RELIEF REQUESTED

Wherefore, defendants-appellants, City of Warren and Warren Fire Department, respectfully request that this Court reverse the June 23, 2000 Opinion of the Michigan Court of Appeals and reinstate the order granting summary disposition entered by the Macomb County Circuit Court.

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